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Marlene Dortch
Secretary
Federal Communications Commission
The Portals
TW-A325
445 12th Street, S.W.
Washington, D.C. 20554

Re: Ex Parte Presentation, WC Docket No. 03-220

Dear Ms. Dortch:

On October 8, 2004, BellSouth filed a petition pursuant to section 10(a) of the Telecommunications Act of 1996 ("the Act"), requesting forbearance from the requirements of sections 251(c)(3), (c)(4) and (c)(6) of that Act for new-build, multi-premise developments. The FCC must decide this petition by no later than January of 2005.

In support of its request, BellSouth has provided data to the Commission demonstrating the enormous growth of facilities-based competition in the Raleigh-Chapel Hill MSA.[1] Using those actual data, BellSouth has presented a conservative analysis of competitive activity within this MSA predicting that 9060 new-build living units (apartments and single family homes) will be added during 2005. Of these 9060 new living units, 24.4% will be passed by CLEC-owned facilities. In addition, cable-owned facilities will pass 97.7% of these new living units. BellSouth will extend and build new facilities to serve some, but not all, of these 9060 units. BellSouth presently estimates that the majority (56.6%) of all new builds occurring in this MSA in 2005 will receive voice service from a provider other than BellSouth. These alternative voice providers will include facilities-based CLECs, Wireless providers and Cable companies offering VoIP. Moreover, the 56.6% estimate does not include any percentage of new-build living units that will receive voice service from a non-facilities based provider via resale, the UNE-P, or UNE-L. At issue in this proceeding is whether continued regulation will deny

[1] *E.g.*, Ex Parte Letter from Kathleen B. Levitz, Vice President-Federal Regulatory, BellSouth Corporation, to Marlene H. Dortch, Secretary, FCC (March 3, 2004).

BellSouth the opportunity to compete on a level playing field with competitive, facilities-based providers to serve new-build developments.

Section 10(d) provides that this Commission can consider granting BellSouth the relief that it seeks from the section 251(c) obligations listed above if BellSouth has "fully implemented" those requirements.[2] Several competitive providers with business models that call for no investment in their own infrastructure have proposed various interpretations of Section 10(d)'s "fully implemented" requirement that would prevent the Commission from considering the actual merit of BellSouth's request under the three-part test Congress established in subsection 10 (a). Because they draw no support from relevant legislative history, standard rules of statutory construction, case law or sound public policy, these proffered interpretations should be summarily rejected.

For instance, certain CLECs suggest that the "fully implemented" requirement is not met until "the establishment of a robust wholesale market in a relevant geographic area that enables competing providers to obtain access to the telecommunications services and facilities they require to enter the market and compete effectively."[3] Under their reasoning, the "fully implemented" requirement is satisfied only after facilities-based providers other than BellSouth are willing to offer these non-facilities based carriers wholesale access in a manner that allows them to "compete effectively." The absurdity of their interpretation is self-evident.

Under such an interpretation, the "fully implemented" requirement of section 10(d) would not be met for new-build MPDs in the Raleigh-Chapel Hill MSA until the facilities-based CLECs and cable companies operating in that area provided these non-facilities based CLECs with comparable access to the former carriers' facility investments. Thus, under their interpretation, even if facilities-based competitors won 99.9% of the new-build MPD market in this MSA next year, the provisions of section 251(c) would still not be fully implemented.

It should be noted that the mere finding that BellSouth has fully implemented the requirements of Section 251(c) for purposes of section 10(d) does not in and of itself grant BellSouth any forbearance relief whatsoever. Such a finding would simply allow the Commission to apply the standards outlined by Congress under section 10(a) that include a consideration of whether a specific regulation in a specific circumstance is necessary and whether forbearance would promote the public interest by enhancing competition. What is most incredible about the interpretations urged by these non-facilities based competitors is that they suggest that the Commission deny itself the ability to consider whether forbearance from certain 251(c) obligations in the limited circumstance of new-build MPDs is actually in the public's best interest. Indeed, these non-facilities based competitors attempt to trump the Commission's consideration of

[2] Section 10(d) of the Act states that: "the Commission may not forbear from applying the requirements of section 251(c)...under subsection (a) of this section until it determines that those requirements have been fully implemented."
[3] Ex Parte Letter from Jonathan Askin et al. to Marlene H. Dortch, Secretary, FCC (March 1, 2004), p. 3.

what is in the *public's* best interest under section 10(a) by demanding that the Commission consider what is in *their* best interest under section 10(d). If the Commission were to adopt any of these unnecessarily burdensome interpretations of the "fully implemented" requirement, the public's best interest would have certainly come last in the Commission's deliberations, if at all.

The normal rule of statutory construction is that identical words used in different parts of the same act are intended to have the same meaning.[4] This general rule should apply with greater force where, as here, the various parts of the same statute containing the identical language were enacted at the same time. As demonstrated above, the non-facilities based competitors have put forth nothing more than an unreasonable interpretation of the "fully implemented" condition that would require competition in a claimed *wholesale* market for transmission components regardless of whether the *retail* communications market is deemed competitive. For it to accept the interpretation proffered by those alternative providers, the Commission would be forced to conclude that the same requirement, *i.e.*, "fully implemented," appearing in different parts of the same statute have different and conflicting meanings. In the absence of any evidence that Congress intended such an outcome, the Commission's adoption of such an interpretation would invite close judicial scrutiny.

In numerous *ex parte* presentations over the past several months, BellSouth has proposed an interpretation of section 10(d) that is in harmony with the overall statutory scheme of the 96 Act, remains faithful to the intent of Congress in providing forbearance authority to the Commission, is consistent with this Commission's prior "fully implemented" determinations and actually ensures that the public's best interest will be promoted. As BellSouth has explained, the Commission should interpret the term "fully implemented" appearing in Section 10(d) as the Commission interpreted the same term as it appeared in Section 271(d). In the latter case, this Commission has consistently held: "In order to obtain authorization under section 271, the BOC must ... show that ... it has 'fully implemented the competitive checklist' contained in section 271(c)(2)(B)...." *See, e.g.,*, La/GA 271 Order, Appendix D, ¶¶ 3 & 5. The Commission should adopt this same interpretation and then focus its deliberations on the requirements of Section 10(a) and whether it is in the public's best interest to grant the requested forbearance.

In this particular proceeding, BellSouth has requested limited forbearance from the application of three distinct subsections of section 251(c). BellSouth's full implementation of each of these subsections received exhaustive Commission scrutiny in the course of the Commission's review of each of BellSouth's 271 applications for compliance with the competitive checklist. For instance, full implementation of checklist item 2 required full implementation of "nondiscriminatory access to network elements in accordance with the requirements of section[] 251(c)(3)"[5] and full implementation of checklist item 14 required full implementation of the requirement that

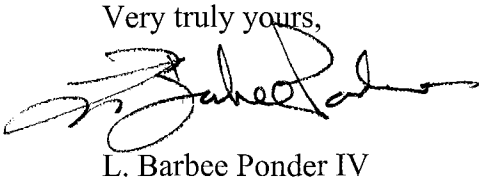
[4] *Commissioner v. Lundy*, 516 U.S. 235, 250 (1996) (quoting *Sullivan v. Stroop*, 396 U.S. 478, 484 (1990)).
[5] 47 U.S.C. Section 271(c)(2)(B)(ii).

"[t]elecommunications services are available for resale in accordance with the requirements of section[] 251(c)(4)."[6] Finally, the Commission fully considered the requirements of section 251(c)(6) as part of its review of BellSouth's full implementation of checklist item 1, for which the Commission found that "[t]he provision of collocation is an essential prerequisite to demonstrating compliance with item 1 of the competitive checklist." La/Ga 271 Order, Appendix D, ¶20. This Commission has previously concluded that BellSouth has fully implemented each and every checklist item in each and every one of its nine states; hence, this Commission has previously determined that BellSouth has fully implemented each and every requirement of sections 251(c)(3), (c)(4) and (c)(6) of the Act.

Further, BellSouth is asking the Commission to reaffirm its prior finding of full implementation of sections 251(c)(3), (c)(4) and (c)(6) of that Act solely for purposes of section 10(d). Limiting the fully implemented determination to section 10(d) would thus avoid any unintended consequences concerning BellSouth's duty to comply with new or different obligations that the Commission might impose in the future under these particular subsections. BellSouth's obligation to comply with any subsequent amendments to the rules and regulations promulgated under these subsections would continue, and BellSouth would remain subject to Commission enforcement proceedings that ensure compliance with such new regulations. And as previously stated, such an interpretation would enable the Commission to reach and address the more important issues of necessity and public interest that are at the root of the Commission's forbearance authority.

For these additional reasons, BellSouth requests that the Commission conclude that it has fully implemented sections 251(c)(3), (c)(4) and (c)(6) for purposes of section 10(d), thus allowing the Commission to consider and grant BellSouth the requested forbearance relief in new-build, MPD situations.

Very truly yours,



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[6] 47 U.S.C. Section 271(c)(2)(B)(xiv).

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